PUBLIC BANK BHD v. TETUAN KUMAR JASPAL QUAH & AISHAH

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
UMI KALTHUM ABDUL MAJID JCA
IDRUS HARUN JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-37-01-2015]
28 JANUARY 2016

BANKING: *Banker and customer – Duty of customer – Forged cheque – Honouring of – Whether bank correctly debited sums from customer's account – Whether customer knowingly or negligently contributed to forgery – Whether cheques honoured in good faith – Whether bank protected – Bills of Exchange Act 1949, s. 73A*

BANKING: *Cheques – Forgery – Honouring of – Duty of customer – Whether customer knowingly or negligently contributed to forgery – Whether cheques honoured in good faith – Whether bank protected – Bills of Exchange Act 1949, s. 73A*

The respondent was a holder of a current account ('the account') with the appellant. PW1, a consultant of the respondent was the signatory of the account. PW1 occupied a smaller office of the respondent along with a sole accounts clerk, Sanesh Kumari ('Sanesh'). The respondent's claim against the appellant began with PW1's trip to Australia. During his absence, the cheque book of the respondent was left in the custody of Sanesh. Cheques for the total sum of RM112,000 ('the said cheques') purportedly drawn on the account by PW1 as the signatory were presented to the appellant's branch. The appellant honoured and paid the said cheques. PW1, upon his return from Australia, discovered the wrongful payments from the account. The respondent therefore alleged that the payments for the said cheques were not authorised, wrongly debited from the account and that the signature appearing on the cheques were forged. In consequence, the respondent commenced an action at the High Court and sought for a declaration that the appellant was not entitled to debit the said amount from the account. The appellant in its defence, *inter alia*, contended that even if PW1's signatures on the cheques were forged or was placed thereon without being authorised by PW1, the respondent and PW1 had knowingly or negligently contributed to the forgery or the making of the unauthorised signatures and as such the signatures should operate and should be deemed the signatures of PW1. The High Court Judge ('HCJ') found that the signatures on the said cheques were forged based on his comparative examination of the disputed signatures on the said cheques as against PW1's specimen signature pursuant to s. 73(1) of the Evidence Act 1950. The HCJ's finding was further fortified by the

A evidence of the court appointed expert document examiner ('PW2') who confirmed that the signatures on the said cheques were not written by PW1. However, the HCJ held that although the signatures on the said cheques were forged, the respondent did not negligently contribute to the alleged forgery. Accordingly, the HCJ entered judgment for the respondent. Hence the B present appeal. The issues that arose for determination during appeal, *inter alia*, were whether the HCJ erred (i) in finding that the respondent was not negligent; (ii) in rejecting the opinion of the appellant's expert witness ('DW1'); and (iii) in not following the decision in the case of *Prima Nova Sdn Bhd v. Affin Bank Bhd* ('*Prima Nova*').

C **Held (allowing appeal with costs)**
Per Idrus Harun JCA delivering the judgment of the court:

(1) The HCJ had amply explained that he undertook a comparative visual examination of the disputed signatures on the said cheques by comparing it against the specimen signature of PW1 on the specimen signature card D kept by the appellant. Upon undertaking the comparison, the HCJ found material and significant differences which were both apparent and obvious to the naked eye. The HCJ was entitled to embark upon this comparative examination as provided in s. 73(1) of the Evidence Act 1950. The HCJ was diligent in his analysis and the HCJ's finding that E the signatures on the cheques were forgeries was not premised solely on the HCJ's visual examination. (paras 15 & 17)

(2) After considering the evidence in totality, the HCJ's finding that the signatures were forgeries was clearly supported by the evidence of PW2. This finding was further strengthened by the evidence of PW1 whose F signature was forged. PW1 was unwavering in his evidence in describing the distinct characteristics of his signature and in stressing that the questioned signatures were forgeries explaining convincingly and with lucidity the significant differences between both signatures. Accordingly, the signatures on the cheques were forgeries. (para 30)

G **(3)** Applying s. 73A which was added to the Bills of Exchange Act 1949 ('Act') by the Bills of Exchange (Amendment) Act 1998, the appellant needs to prove that the respondent had knowingly or negligently contributed to the forgery in the sense of making it easier for the forgery to be committed and that the appellant had acted in good faith when it H paid the cheques. According to the case of *Prima Nova*, the purpose of the amendment to add s. 73A to the Act is to limit the rigours of the strict liability imposed on the banks and to widen the duty of care borne by its customers to not only take care in drawing the cheques but also in the governance of the account and conduct so as to avoid making I easier the forgery of the signature. (paras 37 & 39)

(4) The factual scenario in *Prima Nova* is similar to that of the instant case. When PW1 left for Australia, he left the cheque book entirely in the sole custody of Sanesh despite the fact that she was not an authorised signatory of the account. Sanesh was also literally given exclusive custody without any supervision or control over all the contents of the accounts room. Based on PW1's own admission, Sanesh had worked for him for 20 years and thus would have known the style and appearance of his signature which appeared on the cheques. Therefore, the respondent and PW1 were indeed negligent under s. 73A. They had undoubtedly afforded the opportunity for Sanesh to commit the forgery and their negligence had facilitated the commission of forgery. (paras 45 & 46)

(5) The trial judge had clearly fallen into error in misapprehending the law and evidence in concluding that the respondent had successfully proved its case on a balance of probabilities against the appellant. The appellant had on the other hand, proven its case on the balance of probabilities that the respondent's gross negligence had facilitated, afforded the opportunity and provided the means of making a third party commit the forgeries of the signatures on the cheques. Therefore, this court was perfectly entitled to disturb the findings of the trial judge. (para 60)

Bahasa Malaysia *Headnotes*

Responden adalah pemegang akaun semasa ('akaun') bersama perayu. PW1, perunding responden, adalah penandatangan akaun. PW1 menduduki pejabat kepunyaan responden yang lebih kecil bersama dengan seorang kerani akaun tunggal bernama Sanesh Kumari ('Sanesh'). Tuntutan responden terhadap perayu bermula dengan perjalanan PW1 ke Australia. Semasa ketiadaannya, buku cek responden ditinggalkan dalam jagaan Sanesh. Cek berjumlah RM112,000 ('cek tersebut') kononnya dikeluarkan daripada akaun oleh PW1 sebagai penandatangan dibentangkan kepada cawangan perayu. Perayu menunaikan dan membayar cek tersebut. PW1, selepas kepulangannya dari Australia menemui pembayaran secara salah daripada akaun. Responden, oleh itu mendakwa bahawa pembayaran cek tersebut tidak diberi kuasa, didebitkan daripada akaun secara salah dan tandatangan pada cek tersebut dipalsukan. Maka, responden memulakan tindakan di Mahkamah Tinggi dan memohon deklarasi bahawa perayu tidak berhak mendebitkan amaun tersebut daripada akaun. Perayu dalam pembelaan, antara lain, menghujahkan bahawa walaupun tandatangan PW1 pada cek tersebut dipalsukan atau diletakkan tanpa kebenaran oleh PW1, responden dan PW1 dengan sengaja atau cuai menyumbang kepada pemalsuan atau membuat tandatangan tanpa kebenaran dan dengan itu tandatangan harus beroperasi dan dianggap sebagai tandatangan PW1. Hakim Mahkamah Tinggi ('HMT') mendapati tandatangan pada cek tersebut dipalsukan berdasarkan

pemeriksaan bandingan terhadap tandatangan yang dipertikaikan pada cek tersebut dengan contoh tandatangan PW1 menurut s. 73(1) Akta Keterangan 1950. Dapatan HMT seterusnya disokong oleh keterangan pakar pemeriksa dokumen yang dilantik mahkamah ('PW2') yang mengesahkan bahawa tandatangan pada cek tersebut tidak dibuat oleh PW1. Walau bagaimanapun, HMT memutuskan bahawa walaupun tandatangan pada cek tersebut dipalsukan, responden tidak cuai dalam menyumbangkan kepada pemalsuan yang didakwa. Oleh itu, HMT memasuki penghakiman yang memihak kepada responden. Oleh itu, rayuan ini. Isu-isu dibangkitkan untuk penentuan ketika rayuan, antara lain, adalah sama ada HMT terkhilaf (i) dalam mendapati responden tidak cuai; (ii) dalam menolak pendapat pakar saksi perayu ('DW1'); dan (iii) kerana tidak mengikut keputusan dalam kes *Prima Nova Sdn Bhd v. Affin Bank Bhd* ('*Prima Nova*').

Diputuskan (membenarkan rayuan dengan kos)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) HMT jelas menerangkan bahawa dia menjalankan pemeriksaan visual perbandingan tandatangan yang dipertikaikan pada cek tersebut dengan membandingkannya dengan contoh tandatangan PW1 pada contoh kad tandatangan disimpan oleh perayu. Setelah menjalankan perbandingan, HMT mendapati perbezaan ketara dan penting yang jelas dan terang pada mata kasar. HMT berhak untuk menggunakan pemeriksaan bandingan sebagaimana diperuntukkan dalam s. 73(1) Akta Keterangan 1950. HMT teliti dalam analisisnya dan dapatan HMT bahawa tandatangan pada cek tersebut dipalsukan adalah tidak berasaskan hanya berdasarkan pemeriksaan visual HMT.

(2) Selepas menimbangkan keterangan pada keseluruhannya, dapatan HMT bahawa tandatangan tersebut adalah palsu dengan jelas disokong melalui keterangan PW2. Dapatan ini diperkukuhkan lagi dengan keterangan PW1 yang mana tandatangan dipalsukan. PW1 teguh dalam keterangannya dalam menghuraikan ciri-ciri berbeza tandatangan dan dalam menekankan tandatangan yang dipersoalkan adalah palsu, menjelaskan dengan yakin dan jelas bahawa terdapat perbezaan ketara antara kedua-dua tandatangan. Oleh itu, tandatangan atas cek adalah pemalsuan.

(3) Menggunakan s. 73A yang dimasukkan dalam Akta Bil Pertukaran 1949 ('Akta') oleh Akta Bil Pertukaran (Pindaan) 1998, perayu perlu membuktikan bahawa responden dengan sengaja atau cuai menyumbang kepada pemalsuan dalam membuatkannya lebih mudah bagi pemalsuan dilakukan dan bahawa perayu bertindak dengan niat baik apabila membayar cek. Menurut kes *Prima Nova*, tujuan pindaan untuk menambah s. 73A kepada Akta adalah untuk menghadkan liabiliti ketat yang dikenakan ke atas bank-bank dan untuk memperluaskan kewajipan

berhati-hati ditanggung oleh pelanggan-pelanggannya bukan sahaja dalam merangka cek tetapi juga dalam pengurusan akaun dan tindakan bagi mengelak daripada memudahkan pemalsuan tandatangan.

(4) Fakta dalam kes *Prima Nova* adalah sama dengan kes ini. Apabila PW1 berlepas ke Australia, dia meninggalkan buku cek dalam jagaan tunggal Sanesh meskipun hakikatnya dia bukan penandatangan rasmi akaun. Sanesh juga secara literal diberi hak penjagaan eksklusif tanpa sebarang pengawasan atau kawalan ke atas semua kandungan dalam bilik akaun. Berdasarkan pengakuan PW1 sendiri, Sanesh telah bekerja dengannya selama 20 tahun dan oleh itu mengetahui gaya dan rupa tandatangannya pada cek. Maka, responden dan PW1 memang cuai di bawah s. 73A. Mereka sudah pasti memberikan peluang kepada Sanesh untuk melakukan pemalsuan dan kecuaian mereka memudahkan pemalsuan.

(5) Hakim bicara terkhilaf dalam memahami undang-undang dan keterangan dalam menyimpulkan bahawa responden berjaya membuktikan kesnya atas imbangan kebarangkalian terhadap perayu. Perayu sebaliknya membuktikan kesnya di atas imbangan kebarangkalian bahawa kecuaian responden membantu, memberi peluang dan menyediakan jalan untuk menjadikannya lebih mudah kepada pihak ketiga melakukan pemalsuan tandatangan pada cek. Oleh itu, mahkamah ini dengan sempurna berhak untuk mengganggu dapatan hakim bicara.

Case(s) referred to:

Bumiputra Commerce Bank Ltd v. Globelink Container Line (M) Sdn Bhd [2014] 1 LNS 1462 CA ***(dist)***

Canadian Pacific Hotels Ltd v. Bank of Montreal [1988] 40 DLR (4th) 385 ***(refd)***

CIMB Bank Bhd v. Panaron Control Sdn Bhd [2015] 1 CLJ 1056 CA ***(refd)***

Greenwood v. Martins Bank Ltd [1932] All ER Rep 318 ***(refd)***

Joachimson v. Swiss Bank Corporation [1921] All ER Rep 92 ***(refd)***

London Joint Stock Bank Limited v. Macmillan and Arthur [1918-19] All ER Rep 30 ***(refd)***

ML Breadworks Sdn Bhd v. Malayan Banking Bhd [2013] 1 CLJ 833 HC ***(refd)***

National Australia Bank Limited v. Hokit P/L and Ors [1996] NSWSC 198 ***(refd)***

Prima Nova Sdn Bhd v. Affin Bank Bhd [2014] 9 CLJ 442 CA ***(foll)***

Siaw Kim Seong v. Siew Swee Yin & Anor [2008] 5 CLJ 441 CA ***(refd)***

Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors [1985] 2 All ER 947 ***(refd)***

United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***

Westpac Banking Corp v. Metlej (1987) Aust Torts Rep 80 – 102 ***(refd)***

Legislation referred to:

Bills of Exchange Act 1949, ss. 24, 73A

Evidence Act 1950, s. 73(1)

A *For the appellant - Goh Meng Yew (Katherine Wee with him); M/s Iza Ng Yeoh & Kit*
For the respondent - David Thomas Mathews (Tina Ann Francis with him); M/s Mathews Hun Lachimanan

[Appeal from High Court, Kuala Lumpur; Suit No: 22NCVC-1350-10-2012 (overruled)]

B *Reported by Sandra Gabriel*

JUDGMENT

Idrus Harun JCA:

The Claim

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[1] Messrs Kumar Jaspal Quah & Aishah (suing as a firm), the respondent in this appeal, initiated a civil suit against Public Bank Berhad, the appellant, seeking a declaration that the appellant was not entitled to debit from the respondent's current account No. 3077927830 (the account) on 9 September 2008 the sums of RM10,000 pursuant to cheque No. 259116 (marked as Q1 in DW1's signature verification report dated 20 December 2012) and RM102,000 in cheque No. 259117 (marked as Q2 in the above report) both dated 4 September 2008 (the cheques) and that consequently prays for the said sums to be paid to the respondent. The respondent, in addition, apart from claiming for costs, also claimed interest at 8% per annum from 9 September 2008 or such date when the appellant wrongfully debited the said sums from the account until date of judgment and thereafter further interest calculated at 4% until full payment.

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[2] The appeal in the present instance has been brought by the appellant in light of the High Court's decision in allowing the respondent's claim against the appellant. We heard counsel for both parties and at the conclusion of the arguments allowed the appeal.

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Summary Of Material Facts

[3] Before we embark upon a consideration of the merits of, and the reasons for allowing the appeal, it would be desirable to lay down some of the material facts. The respondent at the relevant time was the holder of the account with the appellant that was maintained at the latter's Jalan Raja Chulan branch. At that point of time, Dato' Vijay Kumar s/o Muthusamy Natarajan (PW1) who was the consultant of the respondent, was the signatory of the account. PW1 was occupying a smaller office of the respondent at Promet along with a sole accounts clerk named Sanesh Kumari, Diana Chee who was his personal assistant and a couple of other staff that was separate from the main office of the respondent at Midvalley where the partners of the respondent and other accounts personnel were situated.

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[4] The circumstances which ultimately culminated in the respondent's claim against the appellant began with PW1's trip to Australia. During his absence, the cheque book and the combination to the safe as well as all the accounts files were left in the custody of Sanesh Kumari. As events turned out, the cheques were presented to the appellant's branch on 9 September 2008. The appellant honoured and paid the cheques for the total sum of RM112,000 purportedly drawn on the account by PW1 as the signatory with the cheque for the sum of RM10,000 payable to Tamilanpan a/l Chelliah and the cheque for the sum of RM102,000 payable to Sanesh Kumari. PW1, upon his return from Australia, discovered that the entire accounts room gutted and all the files and jewellery that were in the safe removed. Sanesh Kumari had vanished. The respondent discovered the wrongful payments from the account on 7 October 2008 when it received the statement of account for the month of September.

[5] The respondent subsequently, by a letter dated 7 October 2008 sent to the appellant, alleged that the payments for the cheques for the total sum of RM112,000 were not authorised by it claiming that the appellant had wrongly debited the sum from the account and that the signature appearing on the cheques were forged or had been placed without the authority of the respondent.

Defence

[6] The appellant's defence essentially, was that the signatures on the cheques were not forged, and even if they were, the respondent negligently contributed to the forgery. Briefly, PW1 at the relevant time was the only person authorised by the respondent to sign all cheques issued from the account based on a letter of instruction dated 13 May 2008. On 9 September 2008, upon clearing the cheques for payment and upon taking appropriate steps in accordance with banking practice and the appellant's policy, the appellant complied with the respondent's instruction to pay the cheques which were signed by PW1 to Tamilanpan a/l Chelliah and Sanesh Kumari.

[7] The signatures on the cheques were compared with PW1's specimen signature and were found to be PW1's signature and since the money in the account was sufficient, the appellant had to comply with the respondent's instruction to pay the cheques. The appellant, it was averred, did not have any power or discretion to refuse payment. In any event, the appellant was not responsible in law to contact the respondent upon receiving the cheques for payment. Nevertheless the appellant contacted Sanesh Kumari but could not speak to her after which the appellant contacted PW1 only to be told that he was not in the office. Since the signatures were found to be valid and the appellant had no reasonable grounds to doubt that they were genuine, the cheques were cleared.

[8] The appellant had also relied on s. 24 of the Bills of Exchange Act 1949 (Act 204) pleading that the respondent was estopped by its conduct and representation from denying the genuineness of the signatures on the cheques. It was also pleaded that the respondent had represented to the appellant that Sanesh Kumari was authorised to confirm all cheques payable from the account and that she was authorised to deal with the appellant.

[9] Alternatively, the appellant contended that, if PW1's signatures on the cheques were forged or were placed thereon without being authorised by PW1, the respondent and PW1 had knowingly or negligently contributed to the forgery or the making of the unauthorised signatures and as such the signatures should operate and should be deemed be the signatures of PW1.

The High Court's Decision

[10] The learned judge found that the signatures on the cheques were forged. His Lordship's finding was grounded on his comparative examination, which he had undertaken pursuant to the power under s. 73(1) of the Evidence Act 1950, of the disputed signatures on the cheques as against PW1's specimen signature in the specimen signature card kept by the appellant. His Lordship's finding was further fortified by the evidence of the court appointed expert document examiner (PW2) from the Department of Chemistry, Malaysia who confirmed that the signatures on the cheques were not written by PW1.

[11] The learned judge further found that the cheques were cleared by the appellant for payment in good faith. However, the appellant had failed on a balance of probabilities to establish negligence on the part of the respondent. The learned judge accordingly found that the respondent had successfully proved its case on the balance of probabilities and entered judgment for the respondent.

[12] The appellant appealed to this court.

The Appeal

[13] The appeal primarily is directed against, and brings to a focus the contentions which are confined exclusively to, the learned judge's findings on core issues that the signatures on the cheques were forged and the respondent did not negligently contribute to the alleged forgery.

Whether The Signatures On The Cheques Were Forgeries

[14] The respondent led evidence through PW1 seeking to prove that the signatures on the cheques were forgeries and that the cheques were not signed and issued by PW1. The cheques were instead issued by Sanesh Kumari without PW1's authority. The learned judge found that the signatures on the cheques were forgeries. Before this court, learned counsel for the appellant

submitted that the learned judge had committed several errors of law and fact when His Lordship arrived at the finding that the signatures were forged. These alleged errors of law and fact in the end and in essence, clearly boiled down to only one principal question, that is, whether as a matter of fact, the signatures on the cheques were forgeries or otherwise PW1's genuine signature.

[15] In his grounds of judgment, the learned judge had amply explained that he undertook a comparative visual examination of the disputed signatures on the cheques by comparing it against the specimen signature of PW1 on the specimen signature card marked "S1" kept by the appellant. Upon undertaking the comparison, His Lordship found material and significant differences which were both apparent and obvious to the naked eye. We are fully satisfied that the learned judge was perfectly entitled to embark upon this mode of comparative examination as provided in s. 73(1) of the Evidence Act 1950 which reads as follows:

> Comparison of signature, writing or seal with others admitted or proved
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> 73. (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

Section 73(1) is clear in its terms and the equally clear pronouncements by the Court of Appeal in *CIMB Bank Bhd v. Panaron Control Sdn Bhd* [2015] 1 CLJ 1056 and *Siaw Kim Seong v. Siew Swee Yin & Anor* [2008] 5 CLJ 441; [2009] 1 MLJ 349 in this regard have rendered unnecessary any further elaboration or interpretation of the section on the purpose for which it seeks to achieve as the decisions plainly show that the learned judge could act or embark upon that course under the said section and make the comparison himself.

[16] In embarking upon such comparative visual examination, we find that the learned judge was diligent in his analysis and had correctly analysed and identified the following material differences:

(a) the formation of the letter K;

(b) the joining of the letters T and A; and

(c) the formation of the J loop in the signature.

These marked differences were, according to the learned judge, apparent and obvious to the naked eye.

[17] The learned judge's finding that the signatures on the cheques were forgeries was not premised solely on His Lordship's visual examination. Having scrutinised the evidence we find that such conclusion is not without any basis. In this regard, we consider the evidence of PW1 as significant. PW1 himself testified under cross-examination that the signatures on the cheques were not his. He explained on oath very lucidly and clearly what natural variations were found in his signature. More importantly PW1 testified that the key features of his signature were not present in the questioned signatures and these were the conjoined letters "t" and "a" in the name "Natarajan" which were always joined. He was emphatic in stressing in his testimony that even if his signature varied, the letters 't' and 'a' were always joined which meant that on the letter 't' the continuation stroke, the cross bar continued with the 'a'. What varied in his signature normally would be the end part, whether he was tired or signing a lot of documents he might not have the 'Natarajan', the 'jan' might sometimes be pulled. But the letters 't' and 'a' were always joined, it was one stroke regardless because that was PW1's pen stroke adding that was his very clear signature characteristic.

[18] We pause here to observe that our own visual scrutiny of the signatures on the cheques and the sample signatures on two cheques marked 'S7' and 'S8' relied upon by the appellant's expert witness DW1 did not bear the conjoined letters "t" and "a" when it is compared with PW1's specimen signature in the appellant's specimen signature card which clearly depicted the conjoined letters 't' and 'a'. We are entirely in agreement with the learned judge's finding that a superficial visual examination of these signatures would plainly show that these signatures do not match with PW1's specimen signature.

[19] The judge's analysis of the material differences in the signatures on the cheques was corroborated by the analysis conducted by the court appointed expert (PW2) who was from the Department of Chemistry, Malaysia. The learned judge in this regard had, on 22 May 2013 ordered the signatures on the cheques to be examined by an independent handwriting expert from the said department. Accordingly, Iskandar bin Azman (PW2), a gazetted document examiner, was appointed to conduct an inspection and analysis of the signatures on the cheques.

[20] PW2 produced a report (exh. D6) dated 17 December 2013 concluding that the signatures on the cheques were not that of PW1 which he further confirmed to that effect in his testimony. In his witness statement, PW2 explained how he came to the above conclusion stating that six significant differences were observed in the handwriting characteristics between the questioned signatures and the specimen signature. These differences in characteristics were:

(a) formation of letter 'k';

(b) diacritics;

(c) formation of the letter 't', as well as the 't' and 'a' connection stroke';

(d) 'J' stroke loop;

(e) underscore; and

(f) formation of the letter 'N'.

PW2 further stated that he examined the exhibits using a visual method comparing the handwriting characteristics between the questioned signatures and the specimen signature using a microscope and loupe to magnify the signatures for the purpose of concluding that the questioned signatures were not written by the writer of the specimens namely PW1. In other words, the questioned signatures were written by another writer other than the writer of the specimens.

[21] For his analysis, PW2 received from the respondent the cheques and 11 documents to be used as his standard one of which was the Public Bank Berhad specimen signature card dated 16 December 1989 (S1).

[22] Learned counsel for the appellant contended that PW2's report did not state the reasons for his conclusion and his reasons were only supplied in the trial much later. We need only say on this aspect that the learned judge did not overlook this issue. In fact His Lordship found that the report itself did not contain the grounds and basis for PW2 to arrive at his conclusion. However PW2 had, during cross-examination, explained in detail the methodology employed for his analysis and had given the reasons as well as justification for his conclusion, which the learned judge found to be cogent and well-founded. This is not a case in which there was completely no explanation by which he came to the conclusion, PW2 had indeed explained in detail to justify his conclusion. We have no reason to disagree with His Lordship's finding on this issue. We therefore cannot accede to the argument urged for the appellant on this issue. Such argument is, in our opinion, wholly unmeritorious and devoid of any logic.

[23] The learned judge gave due weight to the findings of PW2 and his credibility as an independent and disinterested witness with the following observations:

> … PW2 was an unhesitant witness and was able to clearly explain his findings under cross-examination. His testimony was entirely consistent with his report and his credibility was unshaken. He remained calm and steady and was steadfast throughout his testimony. He was able to justify and explain his findings coherently despite being challenged under cross-examination …… As a Court appointed expert, I found PW2 to be independent of the parties and has no interest in the outcome of the case and is a reliable source of expert opinion (see *Pembangunan Yasal Sdn Bhd v. Teo Lee Chun @ Jenny Chin Lee Chu* [2011] 1 MLJU 1169).

[24] Further, His Lordship, in accepting the evidence of PW2, had also taken into consideration PW2's evidence that his technical findings and conclusions in his report were independently reviewed and confirmed by another suitably qualified expert within the Department of Chemistry, stressing that PW2's conclusion was cogent and well-founded and that PW2's methodology employed for his analysis was without any fault. On PW2's qualification, the learned judge was satisfied that PW2 was a gazetted document examiner and observed that he was suitably qualified, trained and experienced to testify in the field. PW2 had academic and on the job training in the field and had attended several courses relating to his speciality. He had also regularly testified in court and his testimony had never been rejected by the courts.

[25] The appellant had called DW1 as its expert to establish that the signatures on the cheques were not forgeries and instead it was in fact PW1's signature. It is to be noted that for his analysis, DW1 was provided with the Public Bank Berhad's specimen signature card and six cheques each bearing the signature of PW1 to be used as his standards in conducting his analysis of the signatures on the cheques. In his signature verification report dated 20 December 2012, DW1 concluded that the questioned cheques "most probably have common authorship to their standards".

[26] The learned judge upon considering the totality of the evidence rejected DW1's opinion and preferred the opinion of PW2, the court appointed expert. His Lordship's grounds for rejecting the opinion of DW1 can be neatly summarised as follows:

(a) DW1 used signatures disputed by PW1 for comparison and these were samples marked "S7" and "S8" in his report. These sample signatures were found on two cheques (but it was not the subject matter of the claim in this suit) which PW1 denounced as forgeries. DW1 admitted that he had assumed that these sample signatures S7 and S8 were undisputed. The learned judge found that the usage of S7 and S8 which were in themselves disputed, were inappropriate for the purpose of comparison and that it would to some extent cloud the issue and affect the conclusion. DW1 had also stated that if the sample signatures S7 and S8 were disregarded his conclusion became less certain. Thus, the elimination of the sample signatures according to the learned judge, would have a profound effect on DW1's conclusion that the signatures on the cheques were that of PW1;

(b) DW1 admitted in his evidence that he failed to consider material difference between the questioned signatures and the sample signatures S1 to S8. DW1 instead considered similarities only. One such fundamental difference was the joining of the letters 't' and 'a' in the 'Natarajan' portion of PW1's signature which according to PW1 was a

peculiar feature of his signature. DW1 had completely omitted to make any finding on this fundamental characteristic and was very evasive in his answers on this aspect of his evidence. His eventual answer that he thought it was a natural variation was rejected by the learned judge as being a "… convenient escape route to explain the obvious shortcoming in DW1's analysis and report";

(c) DW1 had no formal training in the field of document examination;

(d) DW1 was never a gazetted document examiner during his tenure at the Department of Chemistry;

(e) DW1 merely conducted administrative reviews of document examination prepared by other qualified document examiners which did not include technical reviews as he was not qualified to do such reviews;

(f) DW1 has had some of his opinions accepted and some rejected by courts; and

(g) DW1 is a party remunerated witness who was likely to be aware of the outcome desired by the party engaging him. Such witness, like others, have an unconscious bias in favour of the party engaging him (*ML Breadworks Sdn Bhd v. Malayan Banking Bhd* [2013] 1 CLJ 833).

[27] We were pressed with the argument that the learned judge cast an erroneous negative inference on DW1's evidence based on an incorrect understanding of which report came first, contending that this was one of the grounds that caused His Lordship to prefer the evidence of PW2 over the evidence of DW1. It emerged from the grounds of judgment that the learned judge had remarked that "The defendant proceeded to procure the services of DW1 only after PW2 had come up with his report indicating that the signatures on the impugned cheques were forgeries". This statement became the basis for the appellant's above contention. We agree that the understanding of the order of precedence was completely incorrect as DW1's report was dated 20 December 2012 while PW2's report was prepared later and dated 17 December 2013. However we do not think that the learned judge's remark was prejudicial to the appellant's case as nowhere in the judgment was there anything that could indicate or from which it could be implied that this was one of the grounds that caused the learned judge to prefer PW2's evidence over the evidence of DW1. The grounds relied upon by the learned judge in rejecting DW1's opinion were those that we have set out earlier in our deliberation on DW1's evidence. This argument is therefore wholly devoid of any merit.

[28] The appellant had also complained that the respondent only sent the cheques and specimen signature card to the Chemistry Department but withheld those specimen cheques which the appellant had forwarded to the respondent's solicitors through its solicitors to be used as specimens of

standard by PW2. In view of this omission, learned counsel for the appellant submitted that the specimens provided by the respondent for PW2 to be used as his standards were therefore skewed and caused an erroneous conclusion hence destroyed the ability of PW2 to give credible and accurate evidence in this case. We would emphasise that the appellant was not prevented from using these specimen signatures to be compared against the questioned signatures. It is significant to mention that these same specimens had earlier been used by DW1 as his standards in his report. This was admitted by learned counsel for the appellant. DW1's report was made available for the learned judge to peruse and compare with PW2's report. The learned judge had carefully considered the reports and evaluated the evidence of both experts. There was absolutely no evidence to show that PW2's conclusion was skewed and erroneous or the learned judge had misdirected himself in concluding that the signatures were forgeries. The learned judge had correctly accepted the report and evidence of PW2. Therefore, we have very little hesitation in rejecting this argument.

[29] The learned judge had considered the experts' evidence of both PW2 and DW1 very carefully. Having perused their evidence and reports, we are fully satisfied that the learned judge did not commit any error in law and in fact when he rejected the opinion of DW1. The learned judge was in fact even-handed and fair in his treatment of both expert witnesses. His Lordship had considered all relevant factors pertaining to their respective qualifications and training. Both reports were scrutinised comprehensively while the evidence of both witnesses during cross-examination were evaluated very carefully. Upon an overall appreciation of all matters before him, the learned judge preferred the opinion of one witness over the other. His Lordship did not do so blindly but did so after careful and comprehensive analysis as well as due consideration of all relevant matters. We have considered the findings and the grounds strongly pressed by the learned judge in support thereof, in which His Lordship had stated that DW1's report was fundamentally flawed and that his evidence was of no help to the court. We are convinced that the learned judge was completely right in doing so and in the end, in accepting the testimony of PW2 that the questioned signatures on the cheques were forged.

[30] In the final analysis, after considering the evidence in totality, the learned judge's finding, upon undertaking his own comparative visual examination pursuant to s. 73(1) of the Evidence Act 1950, that the signatures were forgeries was clearly supported by the evidence of PW2. This finding was further strengthened by the evidence of PW1 whose signature was forged. PW1 was unwavering in his evidence in describing the distinct characteristics of his signature and in stressing that the questioned signatures were forgeries explaining convincingly and with lucidity the significant differences between both signatures. Accordingly, we are persuaded to conclude that the signatures on the cheques were forgeries.

Did The Respondent's Negligence Facilitate The Alleged Forgery Of The Cheques

[31] This issue is pleaded by the appellant as an alternative defence which in the event that the signatures on the cheques were found to be forged, the appellant would contend that the respondent and its authorised signatory had negligently contributed to the forgery. This issue pertains to a question of law which brings into focus s. 73A of Act 204. Before we go more closely into the matter it is desirable to state the law applicable to this issue. We would start off by reproducing s. 73A below:

> **Knowingly or negligently facilitating forgery**
>
> 73A. Notwithstanding section 24, **where a signature on a cheque is forged** or placed thereon without the authority of the person whose signature it purports to be, **and that person whose signature it purports to be** knowingly or **negligently contributes to the forgery** or the making of the unauthorised signature, the **signature shall operate** and **shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque** or **takes the cheque for value**.
>
> (emphasis added)

The word "Notwithstanding" in this section is to specify that the section would in any event operate inspite of s. 24 indicating precisely that the former is intended to prevail over the latter. Section 24 reads:

> Forged or unauthorised signature
>
> 24. Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.
>
> Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery.

The general tenor of s. 24 as we understand it, primarily renders a forged or unauthorised signature on a bill wholly inoperative and as such no right to, among others, enforce payment on the bill against any party thereto can be acquired or more specifically, in the instant appeal, the appellant had no mandate to pay on the cheques. However the law does not accord this protection if the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority. Accordingly, although under s. 24 the respondent, in connection with this present case, is afforded the statutory protection, the words "subject to the

provisions of this Act" appearing therein show that the section is intended to be subservient to and shall be read with other provisions of Act 204, in particular s. 73A, so that where the respondent is found to have facilitated the alleged act of forgery by their own negligence, it may be precluded from setting up such claim. It is in our view the correct construction of both provisions that the words "Notwithstanding" appearing in s. 73A and the words "Subject to" used in s. 24 when read together would plainly indicate that the former provisions prevail over the latter provisions so that when both sections are construed in this manner, s. 73A in reality provides an instance within the contemplation of s. 24 where any circumstance which gives rise to the application of s. 73A would also come within the exception provided for in s. 24.

[32] Thus, in tandem with s. 24 and by virtue of s. 73A, should the respondent be found to have contributed negligently to or facilitated the act of forgery, the signatures on the cheques shall operate in favour of the appellant which had paid out the sums in good faith. The learned judge in this regard had found that there was indeed no lack of good faith or honesty on the part of the appellant in honouring the cheques. In fact the law imposes such payment to be effected in good faith and makes it as one of the requisite elements before it attracts the application of the deeming provisions in s. 73A and thus allowing any person who pays the cheque to seek the protection under the said section. The learned judge had also found that the defendant had complied with all established banking procedures, examined the signatures on the cheques against the specimen signatures in its system and generally taken all precautionary measures. The respondent, the learned judge stressed, had not shown the appellant to be unduly careless or negligent in doing so. The question has therefore arisen in consequence of this finding whether it was the respondent who was negligent and which negligence had contributed to, or afforded the opportunity for the forgery.

[33] Section 73A was added to Act 204 by the Bills of Exchange (Amendment) Act 1998 (Act A1012) which came into force on 1 November 1997. Prior to the amendment, a customer only had two main duties to the bank under common law. These duties have been adopted by our courts in the case of *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31; [1993] 1 MLJ 182 which we think can be adequately summarised in the following manner:

(i) the customer has a duty of taking reasonable care in the drawing of cheques as not to mislead the bank or facilitate forgery. This principle, which is recognised as the '*Macmillan* duty', was laid down in the case of *London Joint Stock Bank Limited v. Macmillan and Arthur* [1918-19] All ER Rep 30 and *Joachimson v. Swiss Bank Corporation* [1921] All ER Rep 92; and

(ii) the customer has an implied duty to inform the bank if he discovers that cheques purporting to have been signed by him have been forged, as enunciated in *Greenwood v. Martins Bank Ltd* [1932] All ER Rep 318 and this is referred to under common law as the '*Greenwood* duty'.

[34] Over the years, despite attempts to extend under common law the duty of care owed by the customer toward the bank beyond the *Macmillan* and *Greenwood* duties, the court in the end did not expand those duties preferring instead to leave it to the Legislature to implement changes to the long-established principles it considers appropriate (see *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors* [1985] 2 All ER 947; *National Australia Bank Limited v. Hokit P/L and Ors* [1996] NSWSC 198; *Canadian Pacific Hotels Ltd v. Bank of Montreal* [1988] 40 DLR (4th) 385 and *Westpac Banking Corporation v. Metlej* (1987) Aust Torts Rep 80–102).

[35] Reverting to the amendment of Act 204, when s. 73A was incorporated into the Act, the effect of the amendment is to significantly widen the duty of care that is incumbent on the respondent beyond the ambit of the common law as represented by the *Macmillan* duty and the *Greenwood* duty. To put it in plain and simple terms, where the person whose signature on the cheque is forged, or is placed thereon without his authority, knowingly or negligently contributes to the forgery, or the making of the unauthorised signature, the signature shall operate and shall be deemed to be the signature of the person in favour of a person if such person pays the cheque or takes the cheque for value in good faith.

[36] The purpose of the amendment is not difficult to comprehend in that it seeks to increase the protection for any financial institution against the customers. On the other hand, the customers can no longer rest on common law to pin the blame onto the bank where it is the customer's own negligence that has helped the commission of the fraud or forgery. The legislative intent of the section seeks to protect the bank so that where the negligence of the customer has made the forgery easier, the bank is absolved from liability. It is admittedly a fairer approach as both the customer and the bank share a portion of the responsibility should either of them fail to take precautionary steps to prevent the forgery.

[37] Applying the section to the instant case, it would seem clear that the appellant needs to prove that the respondent had knowingly or negligently contributed to the forgery in the sense of making it easier for the forgery to be committed and that the appellant had acted in good faith when it paid the cheques.

[38] Our reference to the official *verbatim* record of debates in Parliament on the amendment to add s. 73A to Act 204 shows that the scenario where the customer allowed a non-signatory staff to have access to cheques was contemplated to be an example of customer negligence that absolves the bank from blame. The relevant excerpts from the Hansard of Parliament reads:

> Pindaan ini bukanlah memindahkan tanggungjawab atau liability daripada bank kepada pelanggan apabila berlaku pemalsuan tandatangan. Ini soalan yang penting. … Pada masa sekarang pihak bank bertanggungjawab penuh sekiranya ada tandatangan palsu, pihak pelanggan boleh melepaskan diri hanya dengan membuktikan tandatangan itu bukan miliknya. Ini merupakan satu ruang yang mesti diperbaiki kerana kegiatan pemalsuan tandatangan hanya boleh dielakkan dengan efektif dengan sokongan semua pihak. *Jadi, kalau misalnya kita suruh budak pejabat ambil beg kita tanpa berkunci dan memberikan cek tanpa melihat, ini adalah kecuaian pelanggan sendiri.*
>
> Pindaan ini tidak memindahkan tanggungjawab dan liability daripada bank kepada pelanggan sekiranya ada pemalsuan tandatangan pihak bank masih bertanggungjawab terhadap wang yang dikeluarkan akibat daripada itu. *Cuma pindaan ini hanya mengarahkan pelanggan agar berhati-hati supaya tidak cuai atau dengan sengaja membiarkan tandatangannya dipalsukan. Oleh itu, pelanggan hanya menanggung kerugian apabila bank boleh membuktikan bahawa pelanggan itu cuai* atau dengan sengaja *membiarkan tandatangannya dipalsukan*.
>
> … Setakat ini hampir semua tanggungjawab dipikul oleh pihak bank, *ini kurang cekap kerana kita tahu buku cek berada di tangan pelanggan*. Apa yang diharapkan ialah pelanggan juga memainkan peranannya untuk bersama-sama meningkatkan keyakinan umum terhadap cek. *Pelanggan perlu berhati-hati agar tidak cuai atau sengaja membiarkan tandatangannya dipalsukan oleh orang lain atau dalam keadaan ini budak pejabat*. Pindaan ini menguntungkan semua pihak kerana meningkatkan keyakinan umum terhadap system cek kita. Dari segi liability ia masih dipikul oleh pihak bank kerana ia hanya dapat memindahkan *liability tersebut kepada pelanggan sepertimana yang saya katakan tadi, sekiranya dapat dibuktikan pelanggan itu adalah yang cuai dan sengaja membiarkan tandatangan dipalsukan* dan ini bukanlah mudah.
>
> (emphasis added)

[39] This court put it succinctly on the purpose of the amendment in its decision in the case of *Prima Nova Sdn Bhd v. Affin Bank Bhd* [2014] 9 CLJ 442, which is to limit the rigours of the strict liability imposed on the banks and to widen the duty of care borne by its customers to not only take care in drawing the cheques but also in the governance of the account and conduct so as to avoid making easier the forgery of the signature. This court explained the effect of the amendment as follows:

> 22. … By reason of the absence of any qualifying words in section 73A, whichever construction is adopted, in our respectful view, there is no basis to limit the protection enjoyed by the bank under section 73A to negligence in the drawing of the cheque only …

23. Accordingly, in our judgment, the effect of section 73A is to afford protection to a bank paying 'in good faith' in all cases in which there was negligence on the part of the drawer and which negligence afforded the opportunity for the forgery or fraud in circumstances that were the immediate cause of the payment by the banker … In other words, the effect of the amendment is that our courts should no longer determine the liability of a bank on a claim on forged cheques based on whether the customer observed the '*Macmillan*' and '*Greenwood*' duties approved by the Supreme Court in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* (*supra*) but the wider duty of care considered but rejected by the Privy Council in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors* (*supra*).

21. The question posed to us in this appeal is really whether section 73A is that piece of legislation which Lord Scarman suggested the banks should encourage the legislature to introduce to overcome their difficulty in incorporating clauses in their contracts extending the duty of care required of their customers. The Learned Trial judge opined this to be the case but provided little by way of legal reasoning to support his Lordship's ruling to this effect. We propose in this judgment to endeavour to provide the reason as to why in our judgment the legislature did indeed intend by this section 73A to impose the wider duty of care on customers.

22. At the outset we wish to highlight that under the '*Macmillan*' rule, the customer is only required to exercise care with the way he draws a cheque. In our judgment, the words "negligently contributes to the forgery or the making of the unauthorised signature" in section 73A whether construed literally or by way of purposive construction, can only have one meaning. That is this. So long as the forgery or the incorporation of the unauthorised signature of the mandatory signatories was caused by the negligence of the authorised signatories, then, the bank is protected provided the payment of the cheque was effected "in good faith". By reason of the absence of any qualifying words in Section 73A, whichever construction is adopted, in our respectful view, there is no basis to limit the protection enjoyed by the bank under section 73A to negligence in the drawing of the cheque only. In our opinion if it was the intention of the legislature to limit the protection afforded by this section to the '*Macmillan* duty', nothing would have been easier than to qualify the word "negligence" with the words "in the drawing of the cheque". In this respect, our opinion to this effect is reinforced by the statements made by the Deputy Finance Minister when introducing this amendment in Parliament.

23. Accordingly, in our judgment, the effect of section 73A is to afford protection to a bank paying "in good faith" in all cases in which there was negligence on the part of the drawer and which negligence afforded the opportunity for the forgery or fraud in circumstances that were the immediate cause of the payment by the banker. Failure to report the stolen cheques in a timely manner and thereby causing the bank to honour the cheques could amount to fraud within section 73A in cases where the forgery was an 'inside job' but would in any event amount to

A a breach of the '*Greenwood* duty'. In other words, the effect of the amendment is that our courts should no longer determine the liability of a bank on a claim on forged cheques based on whether the customer observed the '*Macmillan*' and '*Greenwood*' duties approved by the Supreme Court in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* (*supra*) but the wider duty of care considered but rejected by the Privy Council in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors* (*supra*).

[40] The decision in *Prima Nova*, *supra* was subsequently approved by the Federal Court when it refused to grant leave to appeal. In our opinion, the reasoning of this court in *Prima Nova* has recognised and endorsed the legislative intention of s. 73A in that the law requires the customer and authorised signatory to ensure that they do not make it easier for a person who is not the authorised signatory to commit forgery whereby an example of such negligence is where the non-signatory is given access to the cheque book.

[41] Thus in *Prima Nova* where the authorised signatories of the cheque book of the appellant did not keep it in their possession, instead it was kept by a clerk in the employ of the appellant who was not the authorised signatory, even though the appellant maintained a safe, the appellant was held to be negligent and it was this negligence that had facilitated the forgery, ultimately causing the respondent to honour the stolen cheques.

[42] Clearly, the act and omission of this nature constitutes negligence under and are within the contemplation of s. 73A. The principle that can be gleaned from this decision is that the authorised signatory should secure the cheque book in his custody or at the very least put it in a secure location where any person who is not the authorised signatory cannot gain access to it. If he allows a person who is not an authorised signatory of the cheque to have possession of the cheque book and the forgery occurs, he is negligent under s. 73A.

[43] Having stated the law, we shall next apply the law under s. 73A to the facts of this case in the light of *Prima Nova* case. For the appellant to be absolved from liability and thus seek protection of s. 73A, the appellant would have to show that it cleared the cheques for payment on 9 September 2008 in good faith. The learned judge quite clearly stated that he did not have any doubt in his mind that the cheques were cleared for payment by the appellant in good faith and that the respondent had not shown the appellant to be unduly careless or negligent in doing so.

[44] However, on the crucial issue whether the respondent was negligent and had thus facilitated the act of forgery leading to the payments being made on the cheques, the learned judge stated that the situation in *Prima Nova* was different from the present case. According to His Lordship, the instant case was not a case where the cheque book was left in the open with access to all and sundry, as was the situation in *Prima Nova*. In our judgment, the learned

judge's suggestion is clearly erroneous because the staff that was referred to in *Prima Nova* was not the general staff but specifically the accounts clerks of the appellant. The cheque book in *Prima Nova* was in the possession of the accounts clerks and in fact the drawer where the cheque book was kept was locked but was forced open by someone who stole the cheque book. Nowhere in that case was it intimated that the general staff of the appellant had easy access to the cheque book.

[45] The factual scenario in *Prima Nova* is similar to that of the instant case. Having perused the evidence, we are fully satisfied that PW1 left the cheque book entirely in the hands of Sanesh Kumari, the sole accounts clerk of the respondent at PW1's office. When PW1 left for Australia, he left the cheque book entirely in the sole custody of Sanesh Kumari despite the fact that she was not an authorised signatory of the account, despite the fact that the cheque book and the operation of that account were not needed for the business of the respondent in PW1's absence since he was the sole authorised signatory and despite the fact that Sanesh Kumari was also given the exclusive custody of as well as unmonitored access to all the accounts files of the respondent which contained innumerable examples of PW1's signature and the combination to the safe. In any event, she would be familiar with PW1's signature as, by PW1's own admission, Sanesh Kumari had worked for him for 20 years and thus would have known the style and appearance of his signature which appeared on the cheques.

[46] Given the above factual scenario, we would unhesitatingly hold that the respondent and PW1 were indeed negligent under s. 73A. They had undoubtedly afforded the opportunity for Sanesh Kumari or other person to commit the forgery. Their negligence had facilitated the commission of forgery. In fact the respondent had gone further than what the appellant in *Prima Nova* did. Sanesh Kumari did not merely have access to the cheque book but she was also literally given exclusive custody without any supervision or control over all the contents of the accounts room. PW1 in this regard admitted during cross-examination that Sanesh Kumari was the sole accounts staff in the Promet office of the respondent that the cheque books were kept under her care and custody in the accounts room to which she had access and apart from PW1, Sanesh Kumari was the only staff who had access to the safe. The other accounts staff were based in the respondent's headquarters in Midvalley.

[47] Clearly PW1 had given Sanesh Kumari access to all that she needed to commit forgery without any check and balance while PW1 was away in Australia. The respondent had made it easier for her and indeed afforded her with the opportunity and the means to commit the forgery. The only so-called checks that PW1 alleged he did were a payment voucher system and supposedly checking the bank balances at the end of every month according to the banks statement. However we find that none of these

measures would work as checks against forgery if PW1 entrusted the cheque book to Sanesh Kumari to keep without anyone to supervise her while he was away in Australia.

[48] On the facts and evidence before us, since PW1 has the sole mandate and there being no other authorised signatories, PW1 should have either taken the simple prudent step or good governance measure of taking the cheque book with him, or keeping it in his safe at home which could not be accessed by any person who was not an authorised signatory of the account, or handing it over to one of the partners of the respondent to be kept in the safe at Midvalley office. Since he left for Australia, and being the only person who could sign cheques for that account, it could reasonably and logically be inferred that there was no need to operate the account in his absence. Had PW1 done so, the forgery could have been averted or could not have occurred. It would seem therefore that although the risk management compliance procedures and mechanism were found by the learned judge to have been put in place by the respondent, we are of the view that the respondent had failed to provide adequate mechanism on how to ensure that this kind of incidence would not occur. In our opinion, this is a basic and the most rudimentary aspect of risk management compliance procedures that the respondent should have put in place which the learned judge, with respect, had failed to consider. The internal control that PW1 claimed that he had instituted were manifestly inadequate. Sanesh Kumari still managed to not only forge the cheques (according to PW1's own allegations) but to filch the entire contents of the accounts department.

[49] Based on the reasoning in *Prima Nova* the facts of the instant case fall on all fours to cause the same to apply to this case. In *Prima Nova*, the authorised signatory could have also discharged his duty had he kept the cheque book in his possession or given custody of the cheque book to another authorised signatory or the chairman of the appellant. This is what the Court of Appeal said in that case:

> The facts of this case reveal that the secretary of the company namely one Leela Devi Supaya was authorised to sign cheques on behalf of the appellant as the mandatory joint signatory together with the chairman of the company. However, the cheque book was not in the possession of either Ms. Leela or the Chairman of the appellant.

[50] In our judgment, the trial judge should have applied the principle that the customer must take care to ensure that the cheque book was not accessed by a non-signatory of the account and found that the respondent was negligent for thereby affording the opportunity for Sanesh Kumari to commit the forgery. We find that the failure of PW1 and the respondent to keep the cheque books in their custody constitute negligence under the wider statutory duty of care under s. 73A of Act 204. Based on the decision in *Prima Nova*, the respondent in the present case has a duty that goes beyond the limited

negligence involved in drawing the cheques. The respondent had a wider duty of care not to be negligent that extended to how they managed their affairs and how they kept the cheque book. We reproduce below the relevant extracts from the judgment of this court in *Prima Nova*:

> 24. Applying the wider statutory duty of care introduced by Section 73A, in our opinion, on the balance of probabilities the appellant was negligent and it is this negligence that facilitated the forgery, ultimately causing the respondent to honour the stolen cheques. .... Our finding is that, obviously the staff had easy access to the cheque book and the file containing the specimen signatures thereby facilitating the 'making' of their signatures on the stolen cheques. We are conscious that there are a plethora of authorities to the effect that delegating the task of looking after the cheque book to a staff member and not placing the cheque book in the safe does not *per se* constitute negligence. With respect, in our judgment, this line of authorities can no longer be followed following the introduction of Section 73A.

We have no reason to disagree with the above lucid pronouncement of the Court of Appeal.

[51] The learned judge in the court below had purportedly referred to the unreported decision of this court in the case of *Bumiputra Commerce Bank Ltd v. Globelink Container Line (M) Sdn Bhd* [2014] 1 LNS 1462 (Rayuan Sivil No. W-02-939-2011) accepting that in today's world of business and commerce, it is impractical to expect the cheque book to be kept by the signatory at all times and that the decision in *Bumiputra Commerce Bank Ltd*, *supra* supposedly recognised that it was not negligent for businesses to entrust the custody of cheque books to trusted employees.

[52] However the learned judge failed to consider that this court in *Prima Nova* had expressly rejected this argument holding that the line of authorities applying this argument could no longer be followed following the introduction of s. 73A.

[53] We will add that the learned judge's reasoning was based on a misapprehension of the effect of the *ratio* and the facts of *Bumiputra Commerce Bank Ltd*, *supra* which did not create such a wide exception as the learned judge thought to be the case. In that case the court stated that the respondent as a customer of the appellant had a duty to ensure some level of corporate governance in place and whether such governance level was adequate must be judged premised on the circumstances of each case. The facts of the case revealed that the respondent's mandate to the appellant for cheques for amounts less than RM10,000 was that it should be honoured where two out of three authorised signatories signed the cheques. It turned out that PW1, who was one of the authorised signatories, forged the signature of PW4 who was another authorised signatory. This court held that the respondent was

A fully aware of the need to have "check and balance" for the operation of the cheque account and that requiring two signatories for those cheques was an adequate 'check and balance' system in the circumstances of that case.

[54] For the learned judge to cite *Bumiputra Commerce Bank Ltd* as his reason for not following *Prima Nova*, was a clear error of law. The issue of
B entrusting the cheque book to a non-signatory of the account in the present case was not the issue in *Bumiputra Commerce Bank Ltd* at all. In that case, the forger was PW1 who was one of the authorised signatories to the account and who had every right to hold the cheque book. Therefore the customer, namely the respondent in *Bumiputra Commerce Bank Ltd*, could not be faulted
C for allowing PW1 to hold the cheque book. What excused the respondent was the check and balance system in place which the court found to be adequate. PW1 had circumvented this check and balance system by forging the signature of PW4 and the court found that the respondent could not be faulted for this.

D **[55]** In the present case, there was no check and balance in the mandate of the account nor in the way the cheque book was secured. The sole signatory was PW1. So there was no need for Sanesh Kumari to forge any other signature other than PW1's. Next, the cheque book being left in her custody and there being no other accounts staff nor partner of the respondent to keep
E her accountable meant that Sanesh Kumari could do whatever she wanted. To be more specific, there was completely no check and balance mechanism or system of governance being put in place by the respondent that could deal with the situation when the authorised signatory was overseas to prevent fraud and forgery of the cheques.

F **[56]** Furthermore what the learned trial judge did in misapprehending the effect of *Bumiputra Commerce Bank Ltd* was to actually nullify the purpose for which s. 73A seeks to achieve and to apply an understanding of the law in the days before the amendment of Act 204 by which s. 73A was designed by Parliament to change. It did not occur to the learned judge that if the cheque
G book was to be entrusted by the authorised signatory or the respondent to anyone, naturally that person would have to be someone they had trusted. This is true for logically, if the employee is not a trusted staff of the customer, the cheque would obviously not have been given to such employee in the first place. We do not think that is the legislative intent of s. 73A for what the
H said section seeks to achieve is to absolve financial institutions from liability in cases where forgery occurs where the person whose signature is forged is negligent and such negligence has contributed to the forgery. The level of care in the instant case shows total lack of any system of check and balance in securing access to the cheque book. They had clearly been negligent for
I their own egregious carelessness and were trying to pin the blame on the appellant.

[57] This court's subsequent decision on 25 November 2014 in *CIMB Bank Bhd v. Panaron Control Sdn Bhd* [2015] 1 CLJ 1056 had further strengthened the principle that the customer has the duty to secure the cheque book against staff who were not authorised signatories. It held that the customer had the paramount duty to adequately protect its funds with the bank from being wrongfully taken out and it was not justifiable to shift the blame. There are similarities in the facts of that case with the facts in the present case. The respondent was based in Kuala Lumpur but had an office in Bintulu which was only staffed by a manager. Like in our case, the respondent could not prove who was responsible for the forgery of its signature on the cheques but the manager, like Sanesh Kumari, had vanished. However in *Panaron*, the manager was one of the authorised signatories of the account, so he was entitled to keep the cheque book.

[58] Therefore the respondent in *Panaron* had a stronger case to argue that it was not negligent when compared with the respondent in this appeal. This court found that the trial judge was clearly in error at law and on the fact when he found that the respondent was not negligent adding that the learned judge was more inclined to be somewhat still restricted to the common law position and previously prevailing considerations. The focus of the learned judge was far removed from the critical issue, namely, whether the respondent had provided for adequate control system to prevent forgeries and fraud within its operations. In this appeal, it is manifestly clear that the learned judge had committed the same mistake because His Lordship totally failed to address his mind adequately to the question of the adequacy of the control system to prevent forgeries and fraud within the respondent's own operations.

[59] We agree with this court in *Panaron* that the customer has the duty to properly supervise and control its critical staff from any misconduct including to put in place appropriate procedures in order to control access to cheque books. In *Panaron*, the respondent was found negligent despite assigning PW6 with the duties to monitor from Kuala Lumpur cheque transactions in respect of the respondent's account at Bintulu. In the present case, the respondent did not assign a single other accounts staff situated in the Promet office to be an effective check against excesses by Sanesh Kumari. Neither was someone put in charge at Midvalley office to be an effective check when PW1 left for Australia. Finally, it must also be emphasised that the respondent did not bother to monitor what Sanesh Kumari was doing at the Promet office during the absence of PW1.

Conclusion

[60] While we have found on the first ground that the signatures on the cheques were forgeries, and accept that the judgment of the learned judge is entitled to utmost respect, the reasons to which we have alluded in respect of the appellant's alternative defence, are in our judgment, sufficient to

support our conclusion that this court is perfectly entitled to disturb the finding of the learned judge that the appellant was liable. With respect, we find that the learned judge had clearly fallen into error in misapprehending the law and evidence in concluding that the respondent had successfully proved its case on a balance of probabilities against the appellant. In our judgment, the appellant had on the other hand, proven its case on the balance of probabilities that the respondent's gross negligence had facilitated, afforded the opportunity and provided the means of making it easier for a third party to commit the forgeries of the signatures on the cheques. We therefore allow the appeal with costs of RM8,000 to be paid by the respondent to the appellant and set aside the order of the learned judge. We further order that the sums paid by the appellant, if any, pursuant to the order of the learned judge be refunded to the appellant within 14 days from the date of our decision. The deposit shall be refunded to the appellant.